TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]282

THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

R. P. ANDREWS PAPER COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED MARCH 16, 1920.

CERTIORARI AND RETURN FILED MAY 11, 1920.

(27,560)

(27,560)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 805.

THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

R. P. ANDREWS PAPER COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Caption	1	1
Declaration	1	1
Bill of particulars	2	2
Agreed statement of facts	3	3
Permit to repair or reconstruct buildings	10	10
Special applications for projections beyond the building line	12	13
Application for permit to repair or reconstruct buildings	14	14
Letter of Engineer Commissioner	15	16
Pleas	16	16
Trial by jury waived and case submitted to jury on agreed statement of facts; judgment on verdict ordered, judgment	17	17
Appeal noted	17	17
Memorandum: Appeal bond approved and filed	17	17
Assignment of errors	17	17
Designation of record	18	18
Clerk's certificate	18	19
Minute entry of argument	20	20
Opinion	21	20
Judgment	26	23
Clerk's certificate	27	23
Writ of certiorari and return	28	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1920.

1 Court of Appeals of the District of Columbia.

No. 3267.

R. P. Andrews Paper Co., a Corporation, Appellant,

vs.

District of Columbia.

Supreme Court of the District of Columbia.

At Law. No. 61175.

District of Columbia, Plaintiff,

vs.

R. P. Andrews Paper Co., a Corporation, Defendant.

United States of America,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

Declaration.

Filed April 2, 1918.

In the Supreme Court of the District of Columbia.

At Law. No. 61175.

District of Columbia

vs.

R. P. Andrews Paper Co. a Corporation.

1. The plaintiff, the District of Columbia, a municipal corporation, sues the defendant, R. P. Andrews Paper Co., a corporation, in an action of assumpsit for money due the plaintiff for the rental of vaults built under the public highways of the District of Co-
2 lumbia connected with the premises of the defendant at number 727-31 13th Street, Northwest, in the city of Washington, used and occupied by the defendant in its business for the sale of retail dry goods, in the sum of One hundred and twenty-four dol-

lars and thirty-six cents ($124.36), for a period from September 1, 1916 to June 30, 1918; and the plaintiff claims the sum of $124.36 with interest thereon from the 30th day of November, 1916, together with costs.

2. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at its request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at its request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims $124.36; with interest from the 30th day of November, 1916, according to the particulars of demand hereto annexed.

CONRAD H. SYME,
F. H. S.,
F. H. STEPHENS,
Attorneys for Plaintiff.

2M—10-8-'17. R. 3889-18.

Rent of Vault Space from July 1, 1917, to June 30, 1918, Inc.

Payable at the Office of the Collector of Taxes, D. C., July 1, 1917.

Folio —.

Name of User, R. P. Andrews Paper Co.
Location of Vault, 727-731 13th Street.

To the District of Columbia, Dr.

Square.	Lot.	Value of vault space	Amount of rent.
288	47	$12,064	$60.32
To all of rent.....			$60.32

Received payment.

——— ———,
Collector of Taxes, D. C.,
By ——— ———.

Made by M.
Compared by C. A. M.

3 Office of the Assessor, D. C.

Rent of Vault Space from September 1, 1916, to June 30, 1917, Inc.

Payable at the Office of the Collector of Taxes, D. C., November 1, 1916.

Folio —.

Name of User, R. P. Andrews Paper Co.
Location of Vault, 727-729 13th Street.

To the District of Columbia, Dr.

Square.	Lot.	Value of vault space.	Amount of rent.
288	47	$15,370	$ 64.04
To all of rent			$64.04

Received payment.

——— ———,
Collector of Taxes, D. C.,
By —— ——.

Made by M.
Compared by C. A. M.

Agreed Statement of Facts.

* * * * * * *

It is hereby stipulated by the parties to the above cause, by their respective attorneys, that the same shall be submitted to the court for its judgment, subject to the right of either party to appeal therefrom, upon the statement of facts hereto annexed, with like effect as if the said statement of facts were the finding of a verdict of a jury in the cause, the actual impaneling of a jury therein being hereby waived.

CONRAD H. SYME,
F. H. S.,
F. H. STEPHENS,
Attorneys for Plaintiff.

M. D. ROSENBERG,
E. HILTON JACKSON,
Attorneys for Defendant.

Agreed Statement of Facts.

Section 7 of the Act of Congress, making appropriations for the District of Columbia, approved September 1st, 1916, (33 St. 716, sec. 7) provides:

"That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all
4 users of space under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

On October 17th, 1791, George Washington, then President of the United States, promulgated in the building regulations the following:

"No vaults shall be permitted under the streets, nor any encroachments on the footway above" * * * "without the consent of the Commissioners."

On May 26th, 1845, the corporation of the City of Washington passed certain regulations in regard to the building of vaults under the public highways, which contained, among other things, the following:

"Every person, before proceeding to excavate, or causing to be excavated, any vault or area, shall obtain from the Mayor written permission therefor."

See Webb's Digest, pages 387, et seq.

The City of Washington passed an act on January 2d, 1864, entitled "An Act for vaulting under streets and avenues." Section two of that Act prescribes, among other things:

"And before obtaining permission to construct or make such vault, and previous to the commencement thereof the person so applying shall forthwith deposit in the usual depository of this City, to the credit of the ward fund in which it is located, the sum of Fifty cents for each square foot of ground mentioned, or required for such vault beyond the curb line, under a penalty of not less than Thirty nor more than Forty Dollars."

(Laws of the City of Washington, 61st Council, Chapter 23.)

On August 19th, 1872, the Board of Public Works, under the authority of Section thirty-seven (37) of the Act of Congress, approved February 21st, 1871, enacted a regulation as follows:

"Sec. 12. Vaults may be made not beyond the inner line of the pavement curb, to be securely covered with substantial flagging, or arched with hard brick, the crown of the arch to be at least twelve inches below the established surface of the footway; and any opening in the top of the vault shall be adjoining to or near the curbstone, and have a suitable iron grating or covering placed therein and no grating or other fixture shall project above or be sunk below the established graduation of the pavement."

No charges were prescribed by said Board for the installation or use of such vaults.

On January 1st, 1877, the Board of Commissioners of the District of Columbia adopted certain building regulations, among which was Section 34, which prescribed as a fee "for each permit for vault, $2 per linear foot of proposed vault.

Section fifteen (15) of those regulations prescribes that:

"Vaults shall be securely covered with substantial flagging, or

arched with hard brick. The crown of the arch shall be at least six inches below the established surface of the footway; and any openings in the top of the vault shall be at the inner edge of the extreme wall, and have a suitable covering placed thereon; no iron grate or other fixture shall project above or be sunk below the established grade of the pavement; and the outer wall of the vault must be at least four feet within the inner line of the curb. No vault shall be constructed so as to interfere with any sewer, waterpipe, manhole, gas pipe, tree or other public work, or improvement."

On August 23, 1878, the Commissioners revised the building regulations, retaining, unchanged, Sections fifteen (15) and thirty-four (34), above referred to.

On June 3d, 1882, the Commissioners again revised the building regulations. No change was made in the phraseology or fee respecting vaults, except to add that "vaults on business streets where there is no interference with lamps, trees or other public works, may be built with the outer face of wall at the inner face of the curb."

On November 1st, 1887, the building regulations were again revised and in thus relating to vaults therein, provided "for each permit for vault, $.03 per cubic foot of proposed vault."

On November 1st, 1889, the Commissioners made another revision of the building regulations, but made no change in the phraseology of the regulations in relation to vaults, or in the amount of fees therefor.

On June 26th, 1891, the Commissioners made another revision of the building regulations, fixed the fee "for each vault permit, $.15 per cubic foot of proposed vault." Section nine (9) thereof prescribed that "no vaults or areas will be permitted except by special permit, approved by all of the Commissioners and the Secretary of War."

On October 23d, 1891, the Commissioners adopted a "schedule of limitations and provisions relative to the projection of portions of building beyond the building line, as a basis for the Commissioners' concurrence under the Act of March 3d, 1891." In this schedule was the following provision:

"The area occupied shall be paid for at the rate of fifteen cents per cubic foot. Pavements over vaults must be constructed at the expense or risk of owner or owners of abutting property."

On July 25th, 1892, it was ordered "that the paragraph relating to the rate to be paid for the occupation of vaults, in the schedule of limitations and provisions relative to the projection of portions of the buildings beyond the building line, as set forth in the Building Regulations of the District of Columbia, is hereby amended to read as follows: 'The area occupied shall be paid for at the rate of fifteen cents per cubic foot in front of business houses and ten cents per cubic foot in front of dwellings. Pavements over vaults must be constructed at the expense or risk of the owner of abutting property.'"

In the building regulations adopted December 1st, 1892, in Section nine (9), under the caption, "Vaults under Pavements," is the following:

"Vaults in front of business property, the area shall be charged at the rate of fifteen cents per cubic foot, and in front of dwellings at the rate of ten cents per cubic foot, nor shall permit be issued until plan is submitted and approved, showing openings.

6 Pavements over vaults must be constructed at the expense or risk of owner or owners of abutting property."

Section eight (8) of those regulations likewise fixes a fee for vaults, as follows:

"For each permit for vault, fifteen cents per cubic foot of proposed vault in front of business property, and ten cents per cubic foot in front of dwellings."

The building regulations adopted July 31st, 1897, contained the following provision:

"No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation. No permit for vault or area shall be issued until there is submitted and approved plans showing the location and dimensions of the vault or area, and all openings pertaining thereto."

On February 20th, 1900, the Commissioners passed the following order, defining conditions under which permits for vaults would be issued:

"Ordered: This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes or underground construction that the Commissioners of said District may deem necessary to be placed in the space occupied by the vault, without compensation.

And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators, or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes, or underground construction, are to be introduced in the space occupied by the vault, shall commence to move and forthwith remove, if necessary, any boiler, pipe, wall beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space clear and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground construction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title of interest of the public is in any way waived

or abridged thereby, except as expressed in said permit and the conditions aforesaid."

The building regulations adopted on February 27th, 1902, contained the following, among others: Sec. 123. * * *

"Par. 2. Plans must be submitted, with an application on an official blank, showing the location and dimensions of the vault and all openings; also the depth and proposed construction; and the vault must be built in accordance with the approved plans.

"Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of Section 124, contracting to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses." * * *

(Building Regulations of February 27th, 1902, Continued.)

"Whenever the grade is changed, the vault must be changed and repaved, at the expense of the owner of abutting property, to comply with the new grades."

* * * * * * *

No Charge for Occupation of Space.

Par. 9. "No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, when the vault space is needed for public use or improvements.

"No vaults shall be constructed so as to interfere with any sewer, water pipe, manhole, gas pipe, tree, or other public work or improvement, nor with any electric conduit carrying fire-alarm or police wires."

* * * * * * *

"In case the street, roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public — in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid. And I herewith submit a statement of the proposed and intended uses of the vault, and a list of all machinery and fixtures that will be placed therein, subject to

the limitations of Section 123, and I further agree to use the vault for the purposes authorized by the Commissioners, and for no other purposes, under the terms of this section and agreement, and subject to the penalties for non-compliance as provided in section 195 of the Building Regulations of the District of Columbia."

The building regulations adopted October 18th, 1909, contained, among others, the following:—Sec. 123*a*. * * *

"Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of Section 124, contracting
8 to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners or needed for public uses."

No charges for vaults were made, except $1.00 for permit to construct the vault. The permit issued was similar to the one provided for in the order of February 20, 1900, before quoted.

The building regulations adopted January 18th, 1913, in force on September 1, 1916, contain various provisions in respect to the construction of vaults, but made no charge therefor, except for the usual permit fee of $1.00. Sec. 123*a* and 124.

The permit issued was the same, with the following addition, which also appears in the revisions of 1902 and 1909:

"And I herewith submit a statement of the proposed and intended uses of the vault, and a list of all machinery and fixtures that will be placed therein, subject to the limitations of section 123, and I further agree to use the vault for the purpose authorized by the Commissioners and for no other purposes, under the terms of this section and agreement, and subject to the penalties for non-compliance as provided in section 182 of the Building Regulations for the District of Columbia.

____ ____,
____ ____,
____ ____,
"Owners of Abutting Property."

The Act of September 1st, 1916, entitled "An Act making appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June 30th, 1917, and for other purposes," contained, among others, the following provision:

"Sec. 7. That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

On October 6th, 1916, the Commissioners of the District of Columbia promulgated the following order:

"That, in connection with the legislation contained in Section 7 of the District of Columbia Appropriation Act, approved September 1st, 1916, namely:

'That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users.' "It is hereby ordered:

That rentals shall be paid in advance on the first day of November of each year. For the first year the rental shall be paid from and including September 1st, 1916, the date of the approval of the said appropriation act, to November 1st, 1917.

The amount of rental to be charged and collected in each case shall be based on the area of the vault space multiplied by the assessed value per square foot of the adjoining land, multiplied by
9 one-half of one per cent; the minimum rental in any case to be $5.00 per annum.

The Auditor of the District shall include in the next deficiency estimates an item of $2,000 for the employment of a field party and for necessary incidental expenses in making surveys and computations relative to vault privileges granted in public space.

The Assessor shall immediately prepare printed schedules upon which the data necessary at this time to impose vault rentals may be furnished; the printed schedules to be turned over by the Assessor to the Major and Superintendent of Police for distribution by the several police captains among the users of vault space, who shall furnish, under oath, the information called for therein. The required information when collected by the several police captains shall be returned, through the Major and Superintendent of Police, to the Assessor for the preparation of cards upon which the bills for rental for the first payment from September 1st, 1916, to November 1st, 1917, shall be based.

The Auditor of the District shall set aside from the miscellaneous allotment of the general appropriation for contingent expenses of District offices a sufficient amount to cover the cost of printing the schedules referred to in the preceding paragraph.

The necessary accounts in connection with vault rentals shall be kept in the Assessor's Office, and all bills shall be prepared and delivered by that office."

The above order was amended on October 20th, 1916, as follows:

"That the order of October 6th, 1916, which provides that vault rentals shall be paid in advance on the first day of November of each year, the payment for the first year to include the period from September 1st, 1916, to November 1st, 1917, is hereby amended to read as follows:

"That the rentals shall be paid in advance on the first day of July for each year.

"For the first year the rental shall be paid from and including September 1st, 1916, the date of the approval of the District of Co-

lumbia Act of the fiscal year ending June 30th, 1917, to and including June 30th, 1918.

"The rental for vault space shall be paid within thirty days after the presentation of the bill."

The vaults, for which rental is sought in this case, are built under the public sidewalks, connected with the adjoining premises, and used by the defendant in his business. The rental charged for the vaults is a fair and reasonable one, if it be a legal charge.

The defendant has complied with all the building regulations in respect to the construction and maintenance of the vaults.

The Act of September first, 1916, and the order of the Commissioners pursuant thereto of October 6, 1916, affect the following classes:

a. The owner of premises adjoining the vault who is the user of the vault and built the same for which rent is charged in this case. The vault was constructed pursuant to a permit, a copy of which is attached hereto and made part hereof.

10 *b.* The tenant of premises adjoining the vault for which rent is charged who is the user of the vault, and constructed the same at his own expense, pursuant to a permit, a copy of which is attached hereto and made a part hereof.

c. The tenant of the premises adjoining the vault for which rent is charged who is the user of it; but did not construct the same; but the same was constructed by the owner under a permit from the District, a copy of which is filed herewith.

The defendant herein belongs to class "*c*," as above set forth.

The parties hereto reserve the right to further stipulate as to any material fact concerning the issues in this case at any stage of the cause.

Form 582 E. D.—4M—3-6-15 R. 9244 15.

6 No. 451.

Permit to Repair or Reconstruct Buildings.

Office of Inspector of Buildings.

District of Columbia.

Projections beyond the building line allowed as per plans approved and on file in the office of the Inspector of Bldgs.

Washington, July 27, 1912.

This is to certify, that James Sharp has permission to build vault, show windows, marquises, as per plan (It is a condition of this permit that the Office of the Superintendent of Sewers be notified the

day before work is commenced under this permit.) lot 42 square 288 No. 727-731 13th in accordance with application No. 451 on file in this office, and subject to the provisions of the Building Regulations of the District of Columbia.

The right is reserved to examine the building as often as may be necessary while in course of reconstruction, and order any change in the work that may be deemed requisite to insure sufficient strength, solidity, and safety from fire.

It is a condition of this permit that the office of the Inspector of Buildings be notified the day before work is commenced on reinforced concrete under the permit.

By Order of the Commissioners, D. C.

MORRIS HACKER,
Inspector of Buildings.

Fee paid, $6.

(Over.)

Extracts from Regulations.

No building or other structure, awning, sign, engine, steam or hot water boiler, furnace, machinery, bay window, show window,
11 tower or other projection shall be erected, nor any area, vault, cellar, basement, or excavation appertaining to a building or other structure to be made, nor alterations allowed in any such improvement, unless a permit for such alteration or improvement shall have been issued; and such permit shall be valid and in force for such period in each case not exceeding six (6) months, as the Inspector of Buildings shall determine. See Section 18.

Sec. 145. Persons engaged in the erection, reconstruction, or repair of any buildings may occupy the public space with building materials for such reasonable period as the Inspector of Buildings shall decide, to be specified on permits issued by him, subject to the conditions stated in these regulations. Building materials must be stored on private property until needed at the building under erection or repair.

Sec. 146. The occupation of sidewalks or roadways by articles not intended for immediate use in connection with the operations for which the permit has been issued will not be allowed.

The maximum area permitted to be occupied shall not extend beyond one-third of the width of the roadway on streets where there are no railway tracks. On streets containing railway tracks the space to be occupied outside of the curb shall depend on width of roadway in front of building under construction or repair.

Sec. 147. When considered necessary by the Inspector of Buildings, the space allotted for materials may extend laterally in the roadway twenty feet on each side of the lot on which the building is being erected.

Sec. 148. Materials deposited outside of the parking line must be securely and compactly ar-anged within the allotted space.

Sec. 149. A width of not less than six feet must be kept clear on the sidewalk. No material or rubbish to be placed within two feet of any tree.

Sec. 150. Materials outside of the building line must be placed and arranged as the Inspector of Buildings may direct, and all materials and rubbish shall be removed promptly by the contractor or owner of the property when so directed by the Inspector of Buildings. No gutter shall be obstructed except by temporary damming for collecting water for building purposes, when there are no other available means therefor, under such conditions as the Inspector of Buildings may prescribe. Any shed or temporary structure erected wholly or partly on any public highway under permit issued by the Inspector of Buildings shall be removed within such time as said Inspector shall direct, under a penalty for failure as prescribed in Section 182 of these regulations.

Sec. 151. Each builder or owner occupying the roadway or sidewalk with materials shall exhibit a red light at night, placed in such a manner as to warn the public of the obstruction of the roadway and sidewalk and so as to show distinctly the clear passageway left in the road and sidewalk. When the space occupied by the materials extends for twenty or more feet along the curb, at least one light shall be exhibited at each end of the obstruction, hung clear of the obstruction on the side adjoining the carriageway.

12 Sec. 152. Lime, cement or other mortar and concrete may be prepared upon the parking or roadway within the space above designated to be occupied by building material. If prepared upon roadways improved by concrete, asphalt, or bituminous pavements, it must be upon a tight bed of tongued and grooved boards, placed upon two-inch bearers or sleepers, leaving an air space below, and properly protected so as to prevent any splashing or dripping on the sidewalk, parking or roadway. The distance that mortar beds and building materials may extend from the curb into the street shall be noted on permit.

Sec. 153. The dressing of material on the streets or sidewalks is prohibited, but, by special permit stones, brick, or other material may be dressed within the parking line if suitably inclosed by tight fencing. Old building material may be cleaned under special permits from the Inspector of Buildings.

Sec. 154. Earth taken from excavations and rubbish taken from buildings must not be stored either upon the sidewalks, roadways, or alleys, but must be removed from day to day. Where dry rubbish apt to produce dust is handled, it must be kept wet, or otherwise covered to prevent its being blown about by the wind.

All sidewalks in front of buildings in course of erection must be protected securely against materials falling from the structure or scaffolding, as prescribed in Section 156.

No change shall be made in the limits or outline of any parking or terrace; nor shall any parking fence or terrace be moved, con-

structed, altered, or modified, except in accordance with plans presented to and approved by the Engineer Commissioner.

By order of the Commissioners, D. C.

MORRIS HACKER,
Inspector of Buildings.

Form 512—2M—11-15-17. R. 5365-18.

Fill Out Application in Copying Ink.

Special Applications for Projections Beyond the Building Line.

Washington, D. C., July 18, 1912.

To the Hon. Commissioners, District of Columbia.

GENTLEMEN: I hereby apply for a permit to construct the following projections beyond the building line, in accordance with the drawing hereunto annexed, to building on lot 12 square 288 to be known as No. 727-729-731 13th St., N. W.

Number of buildings one. Width of fronts 59′ 0″ each.

What is the height of the present terrace or parking above curb —.

Is any change proposed in this height of terrace or parking —.

13

No.	Description.	Projection.	Width.	Remarks.
	Areas			
	Balconies			
	Bay windows			
	Colonnades			
	Corner-tower			
2	Marquise	6′ 0″	10′ 6″	
	Oriel window			
	Porte cochere			
	Porch, open			
1	Porch, covered	3′ 0″	30′ 0″	
2	Show-windows	3′ 0″	6′ 0″	
	Steps to main entrance			
	Steps to basement			
1	Vault	29′ 1″ x 2′	0″ 59′ 0″	13th St.
	Manure pit			

Very respectfully,

JAMES SHARP, *Owner.*
Per P. F. GORMLEY CO., *Agent.*

Address Union Trust Bldg.

Widths.
13th St., N. W.
Street, 110.
Roadway, 40.
Sidewalk, 35.
Parking, —.

[Endorsed:] 6. No. 105191. Engineer Dept. D. C. Application for Building Projection. Owner, James Sharp. Location, 727-31 13th St., N. W. (1st indorsement.) ——, 19—. 451. ——, Inspector of Buildings, D. C. July 18, 1912. Electrical Engineer. Electrical Department. Approved July 18, 1912. Walter C. Allen, Electrical Engineer. R. G. W. S. G. W., Jr., Supt. of Sewers. July 19, 1912. Mr. Wepley.

Memorandum.

E. D.

July 22, 1912.

Respectfully forwarded to Major E. M. Markham, Corps of Engineers, U. S. A. Asst. to the Engineer Commissioner D. C., with report that proposed vault will not interfere with existing underground constructions of record.

J. B. GORDEN,
Acting Supt. of Sewers.

G. J. R. W.

Charge for Inspection Approved July 22, 1912.

14 2d Endorsement.

July 22, 1912.

Respectfully returned to Major E. M. Markham, Assistant to the Engineer Commissioner, D. C. with the report that vault projection will not interfere with street tree interests at this location if constructed in accordance with the enclosed plans.

Supt. Trees and Parkings.
T. LANHAM,
Inspr. of Buildings.

1.—3001.

July 22, 1912.

July 26, 1912.

This application complies with the regulations governing projections as established by concurrent action of the Commissioners, and is, therefore, approved by direction of the Commissioners.

MORRIS HACKER,
Inspector of Buildings.

Form 588—2M—11-20-'18. R. 4699-19.
No. brick required — M. Permit No. 451.

Application for Permit to Repair or Reconstruct Buildings.

Washington, D. C., July 27, 1912.

To the Inspector of Buildings:

The Undersigned owner hereby applies for a permit to make repairs in conformity with the Building Regulations.

1. Owner's name James Sharp.
2. House number 727-731 13th Street N. W.
3. Nearest intersecting street H north.
4. Number of lot 42, square 288.
5. Architect's name Milburn, Heister & Co.
6. Contractor's name P. F. Gormley Company.

Description of the Building.

7. How many buildings to be repaired one. Material of house brick. Roof slag.
8. No. of stories in height five. Width of front 59′ 0″. No. of feet deep 87′ & 100′.
9. How is the building to be occupied? mercantile. If a dwelling, how many families?
10. Will the building be wired for Electric lighting, heating or power? Yes.
11. After alteration, will the building conform in every respect with the requirements of the building law? Yes.
12. Collector's receipt for above deposit, No. 28652. Date June 14, 1912. Amount $59.00.
13. What is the estimated cost of the improvements? Cost included in building permit.

Personally appeared before me this — day of ——, A. D. 191–, —— ——, who, being duly sworn, deposes and says that the estimated cost of alteration and repairs contemplated in the attached application for permit is true.

——— ———,
Notary Public, D. C.

Description of Proposed Improvements.

Give definite particulars of just what repairs or improvements are contemplated.

Build vault under sidewalk, show windows, marquises, etc., as shown on plans filed with application for projection.
E. D. 105191.
Plumbing as approved 6/24/12.
Recommended for permit July 27, 1912.

A. R. McGONEGAL,
Inspector of Plumbing.

Application must be signed by owner of property and approved by Inspector of Plumbing.

Signature for Owner, James Sharp.
By Applicant, P. F. Gormley Company.
Address, Union Trust Bldg.

[Endorsed:] Permit No. 451. Application for Permit for Repairs, Alterations, &c. Owner James Sharp. Location Street 727-731 13th St., N. W. Lot 42 Square 288. Permit granted July 27, 1912.

Form 551 E. D.—7-5-'11—2M 271-12.

Office of the Engineer Commissioner of the District of Columbia.

Washington, July 30, 1912.

This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes or underground construction that the Commissioners of said District
16 may deem necessary to be placed in the space occupied by the vault, without compensation.

And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes or underground construction, are to be introduced in the space occupied by the vault, shall commence to move, and forthwith remove, if necessary, any boiler, pipe, wall, beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space near and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground construction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street, roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid.

Owner, JAMES SHARP.

Witness:
P. C. JONES.

Pleas.

Filed April 3, 1918.

* * * * * * *

The defendant for pleas to the declaration filed herein and to each and every count thereof says:

1. It never undertook and promised as therein alleged.
2. It is not indebted as therein alleged.

M. D. ROSENBERG,
E. HILTON JACKSON,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Friday, February 28th, 1919.

Before Judge Hitz.

Session resumed pursuant to adjournment. Hon. Wendell P. Stafford, Justice presiding.

* * * * * * *

17 Now comes the plaintiff by its attorneys Conrad H. Syme, and Francis H. Stephens, and the defendant by its attorneys, Maurice D. Rosenberg and E. Hilton Jackson, and waive trial by jury herein and submit this cause to the Court on the agreed statement of facts filed herein, and after consideration thereof, the Court finds from said facts in favor of the plaintiff for the sum of One Hundred and Twenty-four Dollars and thirty-six cents ($124.36) with interest thereon from the 30th day of November 1916. Thereupon, defendant waiving the time within which to file a motion for a new trial, judgment on verdict is ordered. Wherefore, it is considered that the plaintiff recover herein against the defendant the sum of One Hundred Twenty-four and 36/100 Dollars, ($124.36), with interest thereon from the 30th day of November, 1916, together with costs of suit to be taxed by the clerk and have execution.

From the foregoing judgment, the defendant by its said attorneys, in open court, notes an appeal to the Court of Appeals; whereupon the penalty of a bond for costs, is hereby fixed in the sum of One Hundred Dollars.

Memorandum.

March 7, 1919.—Appeal Bond approved and filed.

Assignment of Errors.

Filed April 1, 1919.

* * * * * * *

1. The court erred in not holding that the erection of the vault herein was pursuant to and in compliance with the express terms of the permit and thereby constituted a vested property right in the defendant.

2. The court erred in not holding that this vested property right may not be disturbed except in the exercise of the police power, which exercise was not attempted by the plaintiff.

3. The court erred in rendering the judgment herein in that the said judgment, if enforced, impairs the obligation of an existing con-

tract forbidden by Article 1, Section 10, of the Constitution of the United States.

4. The court erred in not holding that the Act of September 1, 1916, and the regulations issued pursuant thereto, upon which the plaintiff's suit was based, were unconstitutional and void as being in conflict with Article 1, Section 10, of the Constitution of the United States, prohibiting the impairment of the obligation of contract.

5. The court erred in not holding that said Article 1, Section 10, is as binding upon the District of Columbia as upon the States.

6. The court erred in not holding that said Act of September 1, 1916, and the regulations pursuant thereto, are void because they constitute a discrimination against the rights of the defendant.

18 7. The court erred in not holding that said Act of Congress of September 1, 1916, on its face is so indefinite as to the character, amount and manner of assessing and collecting the rent therein contemplated as to render the same invalid and incapable of being rendered valid by the subsequent regulations of the District Commissioners as herein contemplated.

8. The court erred in holding that said Act of September 1, 1916, may be regarded as a repeal of the prior regulations of said District Commissioners, pursuant to which the vault herein was constructed.

9. The court erred in not holding that said Act of September 1, 1916, is retrospective and retroactive in its character and therefore inoperative and void.

10. The court erred in not holding that the word "thereafter" in said Act of September 1, 1916, gives such statute a prospective operation only and therefore such statute cannot operate to fix the liability of the plaintiff in the case at bar.

M. D. ROSENBERG.
E. HILTON JACKSON.
Attorneys for Defendant.

Service of copy acknowledged.

F. H. STEPHENS.

4/1/19.

Designation of Record.

Filed April 1, 1919.

* * * * * * *

1. Declaration, exhibits and agreed statement of facts thereto annexed.

2. The pleas of the defendant herein filed.

3. The judgment of the court.

4. The assignment of error.

M. D. ROSENBERG,
E. HILTON JACKSON,
Attorneys for Defendant.

Service of copy acknowledged.

F. H. STEPHENS.

4/4/19.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record,
19 according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 61175 at Law, wherein District of Columbia is Plaintiff and R. P. Andrews Paper Co., a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of April, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3267. R. P. Andrews Paper Co., a corporation, appellant, vs. District of Columbia. Court of Appeals, District of Columbia. Filed Apr. 19, 1919. Henry W. Hodges, clerk.

20 Tuesday, December 2nd, A. D. 1919.

No. 3267.

R. P. ANDREWS PAPER CO., a Corporation, Appellant,

vs.

DISTRICT OF COLUMBIA.

No. 3268.

SAKS & COMPANY, a Corporation, Appellant,

vs.

DISTRICT OF COLUMBIA.

No. 3269.

ABRAHAM LISNER, Appellant,

vs.

DISTRICT OF COLUMBIA.

The argument in the above entitled causes was commenced by Mr. M. D. Rosenberg, attorney for the appellants, and was continued by Mr. F. H. Stephens, attorney for the appellee, and was concluded by Mr. E. Hilton Jackson, attorney for the appellants.

21 In the Court of Appeals of the District of Columbia.

No. 3267.

R. P. ANDREWS PAPER CO., a Corporation, Appellant,

vs.

DISTRICT OF COLUMBIA, Appellee.

Opinion.

Opinion of the Court per Mr. Justice Robb.

This is an appeal from a judgment of the appellee, plaintiff below, in an action to recover rent for space under the sidewalk adjacent to appellant's store building in this City.

The facts, as agreed upon by the parties, are substantially as follows: On October 17, 1791, there was promulgated under the direction of President Washington, a building regulation providing that no vaults should be permitted under the streets without the consent of the Commissioners, and thereafter such permission was

sought and obtained under regulations requiring the payment of what in effect was a permit fee by the applicant, but no other charge was prescribed. As early as 1897 the regulations specifically provided that no charge would be made for the occupancy of such public space under sidewalks, "except the usual permit fee." On July 27, 1912, when the permit to construct the vault occupied by appellant was issued to appellant's lessor, the building regulations contained the following provisions: "No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation when the vault space is needed for public use or improvements." This paragraph became Section 123c in the revised Building Regulations of 1913, and was headed "No Charge For Occupation Of Space." The regula-
22 tions further in effect provided that, upon notice from the Commissioners of the District that the vault space was required for certain specified public purposes, the owners would vacate so much of such space as in the judgment of the Commissioners should be necessary. The regulations further provided that the form of the agreement to be signed by the applicant should contain the following: "And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid." These provisions became Section 124 of said revision of 1913. The permit here involved contained a provision that it was issued "subject to the provisions of the building regulations of the District of Columbia."

It thus appears that from 1791 to 1897 permits were issued upon the payment of a permit fee. From 1897 down to and including the date when the permit here involved was issued, the building regulations specifically provided that no charge would be made for the occupancy of vault space, "except the usual permit fee."

Section 7 of the Act of September 1, 1916, (39 Stat. 716), provided "that hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users." Regulations looking to the enforcement of this statute were promulgated by the Commissioners, and this suit was brought to enforce the collection of rent for the vault
23 space occupied by appellant under the permit heretofore mentioned. It is the contention of the District that appellant's rights are to be measured by the provision in the regulations in force when the permit was issued, namely, that "no right, title, or interest of the public is in any way waived or abridged", and hence that appellant is a mere licensee, subject to the will or pleasure of the Commissioners. Appellant, on the other hand, contends that as its permit was issued subject to the provisions of the building regulations, all the provisions of those regulations must be considered

in determining the rights of appellant; that one of those conditions was that no charge would be made, other than the usual permit fee; that, having constructed the vault upon conditions set forth in the regulations, which specifically were made applicable by the permit, appellant obtained a valuable right, of which it may not be deprived summarily; that Congress must be presumed to have intended the preservation of vested interests, and therefore that the statute of 1916 must be given a prospective interpretation.

In 3 Dillon on Mun. Cor., 5th Ed., Sec. 1178, the learned author says: "In many cities lot proprietors upon streets are permitted or not forbidden to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar. It is also the usage that owners of buildings may make openings under the sidewalk or street to obtain additional cellar room." In Gregsten vs. Chicago, 145 Ill. 451, the court ruled that "it is the general doctrine that municipalities, under the power of exclusive control of their streets, may allow any use of them consistent with the public objects for which they may be held"; that "a city under special legislative authority, as well as its general powers, may grant permits for
24 and regulate the building of vaults under the streets, alleys and sidewalks, and require such compensation for the privilege as it may deem reasonable and just, when such permits relate solely to such use of the alleys, etc., as is in nowise inconsistent with their use by the public, and such permit when accepted and acted on by the holder by making costly improvements required will constitute a contract between the City and such holder irrevocable at the mere will of the City." In Tacoma Safety Deposit Co. vs. Chicago, 247 Ill. 192, the court reaffirmed the doctrine that where contractual relations exist between the city and the occupant of vault space, the rights of the occupant may not be abridged summarily. In the Minor Privilege Cases, 131 Md. 600, the municipality attempted to revoke all permits for the occupation of public space, including awnings, areaways, vaults, etc., the real purpose, as the court found, being to require the holder of such permits to make annual payments for the privileges enjoyed. The court, after an exhaustive examination of the question, ruled that this might not be done; that the attempted revocation was not in the exercise of police power, but primarily to obtain revenue. The court said: "No one would expend any considerable sum of money for the ornamentation of his property and benefit of his business, and pay for the privilege, if he supposed that it could be taken from him the next day, month or year, unless he paid such additional sum as that or some other Board exact of him." See also Babbage vs. Powers, 130, N. Y. 281.

In the present case there is no contention that the space occupied by appellant is needed for public purposes, nor is it charged that appellant has failed to comply with any condition affixed to its
25 permit. Every occupant of public space under such permits is subject, of course, to all reasonable police regulations, and, if the space occupied by him is required by the public, his interest instantly must yield to that of the public. These conditions materially affect the value of the privilege enjoyed. The provision in

the Act of 1916 is in no sense a police measure, its sole purpose being to provide revenue. It must be assumed that in the enactment of this provision Congress intended to preserve vested interests. The vault in question having been erected upon condition that no charge would be made for use of the space occupied, we are of the view that Congress did not intend to abridge the right of appellant by the enactment of this statute. The provision relied upon by the District, to the effect that no right, title or interest of the public is in any way waived or abridged, is followed by the words "except as expressed in said permit and the conditions aforesaid"; and those conditions, as we have seen, mean that, while no charge will be exacted for the occupancy of such public space, the rights of the public are paramount, and upon a proper showing of public necessity the occupation of the space must be restricted or terminated. We rule, therefore, that the statute in question was intended to apply and does apply only to permits thereafter issued.

The judgment is reversed with costs and case remanded for further proceedings.

Reversed and Remanded.

Mr. Chief Justice Smyth dissents.

26 January Term, 1920.

No. 3267.

R. P. Andrews Paper Co., a Corporation, Appellant,

vs.

District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

Monday, March 1st, A. D. 1920.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings.

Per Mr. Justice ROBB.

March 1, 1920.

Mr. Chief Justice Smyth dissents.

27 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-

written pages numbered from 1 to 26, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of R. P. Andrews Paper Co., a Corporation, Appellant, vs. District of Columbia, No. 3267, January Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of March, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which R. P. Andrews Paper Company is appellant, and The District of Columbia is appellee, No. 3267, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] 3267. File No. 27,560. Supreme Court of the United States, No. 805, October Term, 1919. The District of Columbia vs. R. P. Andrews Paper Company. Writ of Certiorari. Court of Appeals, District of Columbia. Filed May 7, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3267.

DISTRICT OF COLUMBIA, Appellee,

v.

R. P. ANDREWS PAPER COMPANY, Appellant.

It is hereby agreed between counsel for the appellant and the appellee respectively, in the above entitled cause that a certified transcript of the record on file in this Court may be taken as a return to the writ of certiorari from the Supreme Court of the United States.

E. HILTON JACKSON,
Attorney for Appellant.
F. H. STEPHENS,
Attorney for Appellee.

Endorsed: No. 3267. District of Columbia, Appellee, v. R. P. Andrews Paper Co., Appellant. Stipulation allowing record to be taken as returns to the writ of certiorari. Court of Appeals, District of Columbia. Filed May 10, 1920. Henry W. Hodges, Clerk.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 10th day of May, A. D. 1920.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, District of Columbia, this 10th day of May, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk.

[Endorsed:] File No. 27,560. Supreme Court U. S., October Term, 1919. Term No. 805. District of Columbia, Petitioner, vs. R. P. Andrews Paper Co. Writ of Certiorari and Return. Filed May 11, 1920.